

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS HUTNICK and DEPARTMENT OF THE ARMY,
CENTRAL COMMAND ACQUISITION CENTER, Fort Monmouth, NJ

*Docket No. 02-540; Submitted on the Record;
Issued July 2, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation for obstruction of a medical examination.

On May 12, 1998 appellant, then a 45-year-old procurement analyst, developed back pain after helping to move computer equipment and boxes of files from one building to another. He stopped working on May 13, 1998. The Office accepted appellant's claim for lumbosacral strain. Appellant received continuation of pay for the period May 13 through June 26, 1998. The Office began payment of temporary total disability effective July 5, 1998.

In an April 10, 2000 letter, the Office referred appellant to Dr. John Delong for an examination and a second opinion on the extent of his disability. The Office warned appellant that, if he failed to show for the examination and did not show good cause for such failure, his compensation might be suspended for obstruction of a medical examination. In a May 3, 2000 note, the Office was informed that appellant did not appear for his examination.

In a May 9, 2000 letter, the Office noted that appellant failed to appear for his May 1, 2000 examination. The Office indicated that his compensation could be suspended for obstructing a medical examination. The Office gave appellant 14 days to provide an explanation for his failure to appear for the examination, including medical evidence if he was asserting a medical reason. It indicated that, if he did not provide a good cause for his failure to show for the examination, he would be found to have obstructed the examination and his compensation would be suspended.

In a June 9, 2000 letter, appellant's attorney stated that appellant was unable to attend the May 1, 2000 examination because of his medical limitations. He asked that appellant not be penalized because he was following his physician's advice. The attorney submitted a June 7, 2000 report from Dr. Adriana Stolte, a general practitioner, who stated that appellant recently had a flare-up of his physical condition. She noted that appellant received a letter instructing him to go to an independent examination. Dr. Stolte indicated that the examination would

require appellant to travel more than 40 minutes by car. She stated that she advised appellant to contact the Office to find a closer physician, commenting that he would pass 30 other orthopedic surgeons who could provide the same examination. Dr. Stolte commented that appellant never stated a desire not to comply with the Office's request.

In a July 17, 2000 decision, the Office suspended appellant's compensation effective July 16, 2000 for obstruction of a medical examination.

In an August 17, 2000 letter, appellant's attorney requested a hearing before an Office hearing representative. He submitted a July 29, 2000 report from Dr. Stolte who indicated that appellant was not in condition to travel the distance necessary to see Dr. Delong. She stated she instructed appellant not to attend the examination for specific medical reasons. Dr. Stolte requested that appellant be scheduled for another examination within a five- to eight-mile radius of his house.

The hearing was conducted on March 2, 2001. Appellant's attorney subsequently submitted a March 14, 2001 report from Dr. Stolte who stated that she instructed appellant not to drive more than 15 minutes from his home, based on his physical presentation at that time. She stated that electromyograms showed generalized motor and sensory neuropathy, right-sided L5-S1 radiculopathy and left-sided lumbar radiculitis. Dr. Stolte stated that the restrictions on appellant's driving were directly related to the employment injury. She indicated that, at that time, appellant had a sitting restriction of 15 minutes.

In a September 12, 2001 decision, the Office hearing representative found that appellant had not submitted justified reasons for failing to attend the examination. The hearing representative stated that appellant would have been required to travel 24 miles, approximately 40 minutes each way. She found that the distance was not unusual or unreasonable. She noted that Dr. Stolte had indicated in a November 15, 1999 work restriction evaluation that appellant could sit for 2 hours but had given no explanation for her subsequent change in restricting appellant to 15 minutes of sitting at a time. The hearing representative also noted that appellant was able to attend the hearing which was twice the distance as the travel to the examination would have been. She therefore affirmed the Office's July 17, 2000 decision.

The Board finds that the Office improperly suspended appellant's compensation.

Section 8123(d) of the Federal Employees' Compensation Act provides, in pertinent part:

"If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops."

Appellant failed to appear for his May 1, 2000 examination. However, he presented medical reports from Dr. Stolte which stated that appellant's back pain was so severe that he was unable to sit for more than 15 minutes at a time and therefore was unable to travel to Dr. Delong's office. Dr. Stolte stated repeatedly that she instructed appellant not to go to the examination but to seek an examination from a physician closer to his home. The medical reports from Dr. Stolte and her actions in instructing appellant not to appear at Dr. Delong's examination provides a medical excuse for appellant's failure to appear for the examination. The

record does not contain any medical evidence that would refute Dr. Stolte's statement that appellant was unable to travel to the examination.

The Office hearing representative noted that appellant was able to appear for the hearing. However, appellant had indicated prior to the hearing representative's decision that the trip to the hearing took twice as long as it otherwise would have because he needed to stop frequently to walk and exercise his legs and had to take pain medication for his back. Appellant's ability to travel to the hearing, which was a longer distance than the travel to Dr. Delong's office, cannot be used to find his reason for his failure to appear at the examination because of the unrefuted medical evidence submitted by Dr. Stolte discussing appellant's limitation in sitting for extended periods.

The Office hearing representative also noted that Dr. Stolte, in November 1999, had stated that appellant could sit for up to two hours. Dr. Stolte indicated however that appellant had experienced a flare-up of symptoms at approximately the time of the referral to Dr. Delong and therefore had severe limitations in his ability to travel at that time. The Office has not provided any reasonable basis to question Dr. Stolte's reports that appellant was unable to travel to Dr. Delong's office for the examination. As appellant provided a medically supported reason for his failure to appear for the examination as required by the Office, the Office acted improperly in suspending his compensation.

The decision of the Office of Workers' Compensation Programs, dated September 12, 2001, is hereby reversed.

Dated, Washington, DC
July 2, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member